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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 182

PATRICIA I. BIRNEL,
Appellant,

vs.

THE TOWN OF FIRCREST,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

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MOTION TO DISMISS APPEAL

Comes now the Appellee herein and moves the Court for an Order dismissing the Appeal filed by Appellant, for the reason that it does not present a substantial Federal question; that no debatable constitutional question is involved in said cause; and further, that no question arising under the Constitution of the United States is involved in said cause.

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BRIEF IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF THE CASE

The facts presented in Appellant's Brief under "Question Presented" and "Statement of the Case" are, for the purpose of this Motion, admitted to be substantially correct.

ARGUMENT

Appellant's Brief urges that the only Constitutional question presented in this Appeal is a denial to Appellant of her liberty without due process of law, in violation of the 14th Amendment of the Constitution of the United States. This question has been before the Court in three prior cases.

DeAryan v. Butler, 119 Cal. App. 674, 260 P.(2d) 98 (No. 651, cert. den.) 347 U.S. 1012, certiorari denied;

Chapman v. Shreveport, 225 La. 859, 74 S.(2d) 142, (No. 407, app. dis.) 348 U.S. 892, Appeal dismissed.

Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.(2d) 609, 351 U.S. 935, 76 S. Ct. 833, 100 L. Ed. 1463, Appeal dismissed.

Appellant's argument for the most part is an attempt to distinguish her case from the above cited cases and various points are urged as reasons for doing so. The Supreme Court of the State of Washington has also decided this question adversely to the Appellant in *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P.(2d) 352.

Appellant states, at page 9 of her Brief, that "it is not necessary that fluoride be added to the public water supply system or to drinking water at all in order to make it economically available to those desiring such medication", and since such an allegation was not present in the three previously cited cases, this case does, for that reason, raise a question under the 14th Amendment of the Constitution of the United States, which is both important and substantial. Appellee, in answer to that contention, wishes to point out that that precise question was involved in the Kraus, Chapman and DeAryan cases *supra*. The Supreme Court of Ohio in the Kraus case *supra* stated: "It is argued that the same result might be accomplished by private dental care, and since there is an alternative to public regulations, police power may not be invoked. Although it is admitted that private care would be effective, the record shows that there are not sufficient private dental facilities to perform the task. Under our modern existence the law must change and expand with mechanical and scientific progress. What did not concern public health yesterday, because of an inability of science to cope with the problem at hand,

may very well today become a matter of public health due to scientific achievement and progress. The use of fluoridation to prevent dental caries is an excellent example of this proposition. Science has discovered a method whereby dental caries may be diminished. The prevalence and danger of such caries are well known and the only practicable application of such scientific knowledge is by treating drinking water with fluoride. Thus the problem of dental caries has of necessity become one of public health."

The Supreme Court of Louisiana in the Chapman case *supra*, in disposing of this contention, stated as follows: "The Appellee insists and the District Judge concluded that fluoridation of the water to prevent tooth decay is not a matter of public health, but a matter of private health and hygiene. The evidence in this record refutes overwhelmingly this conclusion. Dental caries is one of the most serious health problems in the City of Shreveport and in the nation as well. The fact that it is not a communicable disease and one that can cause an epidemic does not detract from its seriousness as affecting the health and well-being of the community. The plan for fluoridation, therefore, bears a reasonable relation to the general welfare and general health of the community and is a valid exercise of the police power conferred by Section 2.01 of the Charter as it is not arbitrary or unreasonable." The Court found further, in reviewing the judgment of the District Court, that the regulation was not arbitrary or unreasonable.

It will be noted then, from the foregoing, that the issue of availability of other voluntary means of accomplishing the desired result was discussed in the Kraus and Chapman cases *supra*. Further reference should be made to Appellant's Brief, page 10, in which it is stated

that the Supreme Court of Indiana in the case of *Teeter v. La Porte;* 236 Ind. 146, 139 N.E.(2d) 158, distinguished the Chapman and Kraus cases *supra.* A review of the Indiana case will show that it was a case of first impression in the State of Indiana, and that the Supreme Court desired, rather than that the matter be disposed of on the basis of a demurrer, that evidence of the allegation in opposition to fluoridation be received by the Trial Court and was, for that reason, returned for trial. The situation differed in Washington where the Supreme Court had previously ruled on all the substantial points in issue in the Kaul case, *supra.*

Appellant further states on page 10 of her Brief that "heretofore the exercise of the police power has been limited to the purpose of protecting members of the community from on another or from the spread of communicable diseases". Citing *Jacobson v. Massachusetts,* 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643. Appellee differs.

Reference is made to the Kraus case *supra* in which the Supreme Court of Ohio stated as follows: "Clearly, neither an overriding public necessity nor emergency, nor infectious or contagious diseases are the criteria which authorize the exercise of the police power in relation to public health. That dental caries is a disease is not questioned and its prevalence is well recognized as is the fact that the health of the teeth bears a direct relationship to general physical health."

In sustaining a similar fluoridation Statute the Court in *Dowell v. City of Tulsa, Oklahoma,* 273 P.(2d) (Okla) 859 (1954), stated: "The relation of dental hygiene to the health of the body generally is now so well recognized as to warrant judicial notice. Thus, the fact that dental

caries is neither infectious nor contagious does not remove it from the authority of a municipality to attempt its control by fluoridation of the water supply."

To the same effect is the Kaul case *supra*, which quoted from the Kraus case, and to the same effect is the previously quoted provision from the decision of the Supreme Court of Louisiana as bearing not only upon the issue of communicable diseases, but private health measures as well.

Again Appellee wishes to point out that the issue of communicable disease has been before this Court on prior occasions and either certiorari has been denied or the appeals have been dismissed.

Appellant, in her Brief, page 11, quotes extensively from the Jacobson case *supra*. We agree completely with the decision and the reasoning of that case. Futhermore, Appellee wishes to point out that in the Jacobson case various offers of proof on behalf of the defendant were denied and rejected by the Trial Court, which denial was upheld on appeal by the Supreme Judicial Court of Massachusetts and later by this Court, which quoted extensively from the decision of the Massachusetts Court. What practical difference can there be under the 14th Amendment etiher that the Appellant cannot introduce testimony with respect to his allegations, or that we assume that he has, and they have been held for naught as in a demurrer? Both cases come to the same conclusion, but through different avenues. This present case and the Jacobson case have a great deal in common. Jacobson offered to prove that vaccination quite often caused serious and permanent injuries to the health of the person vaccinated; that it occasionally resulted in death; that it was impossible to tell in any particular case what the results of vaccination would be.

Appellant pleads that the ingesting of ionized fluorine by drinking water containing fluoride in the proportion approved by the State Board of Health, in addition to causing a "pathological condition" in the enamel of the teeth of children consuming such water, which condition is commonly known as mottled enamel and habitually affects the enamel structure of the teeth of "some" of the children (which condition Appellee suggests to be quite harmless), and causes "other effects" which are "incompletely known." Further the Appellant alleged that her two minor children "might be" among those afflicted by mottled enamel, and that she feared lest she and her children sustain some "other effect" in or upon their bodies adverse to their health or objectionable to them from drinking water containing fluoride, as provided by the Ordinance of the Town of Fircrest.

In disposing of the offer of proof, which is couched in language not unlike the present case, the Supreme Court of the United States, through Justice Harlan, stated: "These offers in effect invited the Court and Jury to go over the whole ground gone over by the Legislature when it enacted the Statute in question. The Legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination, and it is suggested, and we will not say without reason, that such is the case with some adults. It seems to the Court that the effect would be to practically strip the Legislative Department of its function to care for the public health and the public safety when endangered by epidemics or disease."

The Chapman case *supra* states: "There is no merit in Appellee's argument that if the City Charter grants to the City Council of Shreveport authority to fluoridate its water supply, such action to that extent is a violation

of the 14th Amendment to the United States Constitution. The 14th Amendment does not deprive a State or its subdivision of the right to preserve order or to protect the health of the people under its police power and in the exercise of its power the Legislative Branch may interfere with and impair the individual liberty of the citizens in the manner and to an extent reasonably necessary for the public interest and the Courts will not interfere except where the measures invade fundamental rights or are arbitrary, oppressive or unreasonable. This is not a proper case for judicial interference". . . . At the present time fluorides are being added to the public water supplies in practically every state in the Union and in the District of Columbia. Vital statistics from communities in the United States consuming water containing one part of fluoride per million parts of water and reports from physicians in these communities have indicated uniformly and without exception, no undesirable effects on birthrate, death rate, elderly or sick individuals or any other persons. As a result of these facts and of various studies and experiments on the subject, the fluoridation of public water supplies has been approved and recommended by the United States Public Health Service, National Institution of Health, American Dental Association, American Medical Association, American Public Health Association, Association of State and Territorial Health Officers and numerous other national and state scientific organizations.

What everybody knows, the Court must know, and the Court below judicially knew that a belief opposite to the belief of the Appellant accords with the common belief and is maintained by high medical authorities. Appellee respectfully submits that this Court may take judicial notice of the fact that no harm can come to any

user of public water supplies under rules and regulations of the appropriate health departments of the State of Washington.

CONCLUSION

In conclusion, Appellee respectfully submits that the Appellant presents no question of a substantial character in conflict with prior decisions of this Court. We therefore submit that the Appeal be dismissed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that 3 copies of the above and foregoing Motion and supporting Brief has been served on opposing counsel by depositing the same in a United States Post Office or Mailbox with first class postage prepaid addressed to counsel of record, Alfred J. Schweppe, Mary Ellen Krug and Frederick C. Tausend, at their address, 657 Colman Building, Seattle 4, Washington.

This ..... day of ..... , 1959.

CREIGHTON C. FLYNN,
Of Counsel for Appellee.